Supreme Court, U.S.
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No. 96-595

In the Supreme Court of the United States

OCTOBER TERM, 1996

JANET RENO, ATTORNEY GENERAL
OF THE UNITED STATES, APPELLANT

v.

JOE SHEA

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

RESPONSE TO THE MEMORANDUM OF APPELLEE

WALTER DELLINGER
Acting Solicitor General
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

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In our jurisdictional statement, we suggest that the Court hold the appeal in this case pending the Court's decision in *Reno* v. *ACLU*, No. 96-511, and then dispose of it as appropriate in light of that decision. As we point out in the jurisdictional statement, the questions presented in this case are also presented in *ACLU*, and while there is only a single appellee in this case, the appellees in *ACLU* include a broad range of entities that post or send messages on the Internet. Appellee nonetheless contends that the Court should note probable jurisdiction of the present appeal and consolidate this case with *ACLU*. Appellee's reasons for urging that course are unconvincing.

1. Appellee contends (Mem. 5) that, while many of the legal issues raised in this case were raised in *ACLU*, this case raises "a significant legal argument not addressed in the Philadelphia case: whether the CDA violates the free press rights of a newspaper that publishes on-line." The district court in this case, however, did not resolve any free press question when it entered a preliminary injunction. J.S. App. 75a. The government's appeal therefore does not present any such issue at this stage of the case.

2. Appellee next claims (Mem. 10) that, while much of the record in *ACLU* was entered into evidence in this case as well, the record below contains "important evidence" that is not in the record in *ACLU*. There are some differences between the records in the two cases. None of those differences, however, is significant enough to justify noting probable jurisdiction in this case and consolidating it with *ACLU*. The testimony cited by appellee (Mem. 11-13), in particular, is largely duplicative of similar evidence offered in *ACLU*, and, in any event, does not have a significant bearing on the question whether the CDA's restrictions on patently offensive communications are facially unconstitutional.

3. Finally, appellee asserts (Mem. 13-15) that it would be unfair not to consolidate this case with *ACLU*, because the Court is likely to consider the reasoning of the district court's opinion in this case in disposing of the issues raised in *ACLU*. When the Court grants review in a case, however, it often considers the legal reasoning of other courts that have addressed the same issue. That common occurrence has never been viewed as a sufficient justification for granting plenary review in the other cases as well. To the contrary, when the Court grants certiorari in

a case, it routinely holds cases raising the same issue pending its decision in the case in which it has granted certiorari. That same course is appropriate with respect to the government's appeal here.

* * * * *

For the foregoing reasons, as well as those discussed in our jurisdictional statement, the appeal in this case should be held pending the Court's decision in *Reno* v. *American Civil Liberties Union*, No. 96-511, and then disposed of as appropriate in light of that decision.

Respectfully submitted.

WALTER DELLINGER
Acting Solicitor General

DECEMBER 1996